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No. 16-32

In the Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, DBA WINCHESTER CENTRE FOR HEALTH AND REHABILITATION, NKA FOUNTAIN CIRCLE HEALTH AND REHABILITATION, ET AL.,

Petitioners,

v.

JANIS E. CLARK AND BEVERLY WELLNER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

REPLY BRIEF FOR PETITIONERS

ANDREW J. PINCUS
Counsel of Record
ARCHIS A. PARASHARAMI
DANIEL E. JONES
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioners

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REPLY BRIEF FOR PETITIONERS[1]

The brief in opposition offers little in defense of the merits of the decision below. Respondents instead largely parrot the pronouncement by the Kentucky Supreme Court majority that its holding does not discriminate against arbitration agreements. But that characterization cannot be squared with what the Kentucky court actually did. The decision below holds that a power-of-attorney document that conveys the authority to enter into contracts is effective as to all contracts *except* arbitration agreements—for which an additional explicit reference to arbitration is required.

As the petition explains, that differential treatment of arbitration runs headlong into this Court's repeated instruction that the FAA "preclude[s] States from singling out arbitration provisions for suspect status." *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996); see also *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 468-69 (2015); *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011); *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987). And just as in *Imburgia*, this Court's intervention is needed to correct the lower court's defiance of the FAA under the guise of state contract law.

Respondents' other arguments against review fare no better. They contend that the FAA does not apply because the rule announced below is nominally one of contract formation—but a similar argument was raised, and rejected, in *Imburgia*. They suggest that the Court should await a decision on the issue by the Sixth Circuit—but doing so is neither neces-

[1] The Rule 29.6 Statement in the Petition remains accurate.

sary nor advisable. And they argue that this case is a poor vehicle because it comes from a state court—ignoring the fact that many of this Court's FAA cases have arisen in precisely that setting.

In short, the conflict between the decision below and this Court's FAA precedents is clear, and respondents have not articulated any persuasive reason why this Court should decline to review the important, and clearly erroneous, ruling by the Kentucky court concerning the proper interpretation of the FAA in the context of cases like this one.

I. Respondents' Asserted Obstacles To Review Are Flimsy.

Respondents make a variety of arguments for why they believe this case is unsuitable for review. But each of those arguments is demonstrably incorrect.

A. The Lack Of A Conflict With The Sixth Circuit Is No Reason To Deny Review.

First, respondents argue that review should be denied because there is no conflict between the decision below and the decisions of other courts. Opp. 12-13. But this Court has repeatedly corrected state courts' failure to apply the FAA properly—notwithstanding the absence of an appellate court conflict—when the state court's ruling is clearly wrong and threatens significant adverse consequences. *E.g.*, *Nitro-Lift Techs., L.L.C.* v. *Howard*, 133 S. Ct. 500 (2012) (per curiam); *Marmet Health Care Ctr., Inc.* v. *Brown*, 132 S. Ct. 1201 (2012) (per curiam); *KPMG LLP* v. *Cocchi*, 132 S. Ct. 23 (2011) (per curiam); *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52 (2003) (per curiam). The Court's intervention

here is justified on those same grounds. See Pet. 20-23.

Indeed, as the petition demonstrates (at 18-19), the decision below conflicts with the decisions of every Kentucky federal court to rule on the issue, creating an outcome-determinative split between the state and federal courts in Kentucky. The enforceability of an arbitration agreement signed by an agent in Kentucky therefore turns entirely on whether a party seeks to enforce the agreement in state or federal court.

Since the petition was filed, that conflict has only become further entrenched: a judge on the Eastern District of Kentucky has joined the impressive array of Western District judges in rejecting the decision below, explaining: "The Court agrees * * * that *Whisman* is preempted by the FAA. * * * Without question, the Kentucky Supreme Court has singled out arbitration agreements by requiring that a [power of attorney] expressly include an agent's authority to enter into a pre-dispute arbitration agreement, as opposed to other types of contracts." *GGNSC Stanford, LLC* v. *Gilliam*, 2016 WL 4700135, at *6, 7 (E.D. Ky. Sept. 7, 2016).[2]

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[2] *Whisman* also conflicts with the decisions of courts in at least two other States. See Pet. 19 n.6 (citing *Myers* v. *GGNSC Holdings, LLC*, 2013 WL 1913557 (N.D. Miss. May 8, 2013), and *Estate of Smith* v. *Southland Suites of Ormond Beach, LLC*, 28 So. 3d 103 (Fla. Dist. Ct. App. 2010) (per curiam)). Respondents attempt to minimize this conflict as a mere disagreement regarding state law (Opp. 13), but that misses the point entirely. Petitioner cited these cases not to establish any proposition about the FAA, but rather as further confirmation that the Kentucky Supreme Court's rule is "unique" and "restricted to [the] field" of arbitration (*Imburgia*, 136 S. Ct. at 469) because it is so at

Respondents suggest that this split may resolve itself and argue that this Court should stay its hand until the Sixth Circuit weighs in on the issue. Opp. 12-13. As a practical matter, however, the issue may not be presented to this Court in another case.

Consistent with this Court's precedents, the Sixth Circuit is likely to affirm the Kentucky district courts' holdings that *Whisman* is preempted by the FAA. The prevailing defendants in those cases would therefore be unable to seek certiorari. And the plaintiffs in those cases would likely not seek certiorari for strategic reasons, choosing instead to find ways to file future cases in state courts.[3]

There accordingly is no reason to wait for the Sixth Circuit to weigh in—especially given that, as several *amici* explain, the decision below already "throws into doubt the enforceability of countless arbitration agreements" between care facilities and their residents, sowing "legal uncertainty" that benefits no one. Br. of Am. Health Care Ass'n et al. 6 ,7.

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odds with the ordinary interpretation of powers of attorney and therefore impermissibly singles out arbitration agreements for disfavored treatment.

[3] Moreover, no new case presenting this issue is likely to reach this Court from Kentucky state courts. Parties are highly unlikely to invoke arbitration under similar circumstances in Kentucky courts, suffering losses at every level of the state court system, solely for the opportunity to seek this Court's review. Certainly, those parties are most unlikely to litigate such cases on the merits simply to preserve the arbitration issue—the cases are far more likely to settle, precluding any further review of the arbitration question.

B. The Case's Origins In State Court Are No Bar To Review.

Next, respondents argue that this case is a "poor vehicle to dispose of this issue" because it arises out of a state court. Opp. 32. Yet that has never been an obstacle to this Court's review. To the contrary, because "[s]tate courts rather than federal courts are more frequently called upon to apply the * * * FAA," "[i]t is a matter of great importance * * * that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift Techs.*, 133 S. Ct. at 501.

Respondents also suggest that Justice Thomas's view that the FAA does not apply to state-court proceedings complicates the resolution of this case (Opp. 33), but that view has never limited this Court's exercise of its authority to ensure that state courts properly apply the Court's settled FAA precedents. Indeed, the Court has regularly taken summary action in and undertaken plenary review of state-court decisions applying the FAA. See *Schumacher Homes of Circleville, Inc.* v. *Spencer*, 136 S. Ct. 1157 (2016); *Ritz-Carlton Dev. Co.* v. *Narayan*, 136 S. Ct. 800 (2016); *Imburgia*, 136 S. Ct. 463; *Nitro-Lift Techs.*, 133 S. Ct. 500; *Marmet*, 132 S. Ct. 1201; *Cocchi*, 132 S. Ct. 23; *Preston* v. *Ferrer*, 552 U.S. 346 (2008); *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440 (2006); *Citizens Bank*, 539 U.S. 52; *Casarotto*, 517 U.S. 681; *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265 (1995); *Perry*, 482 U.S. 483; *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984).

C. Granting Review Here Will Not "Federalize" State Contract Law.

Finally, respondents argue that granting review and reversing here would "federalize a huge area of

State law." Opp. 34. But this Court rejected a similar argument in *Imburgia*, where the respondents argued in their brief in opposition that review should be denied because the California court had decided the case on state-law grounds. See Br. in Opp. to Pet. for Writ of Cert. at 3, *Imburgia* (No. 14-462), 2015 WL 455815, at *3.

This case, like *Imburgia*, simply calls for an application of the same fundamental "equal footing" principle that this Court has applied in numerous other FAA cases to prohibit States from treating arbitration agreements differently from other contracts. See *Casarotto*, 517 U.S. at 687 (noting that the FAA "preclude[s] States from singling out arbitration provisions for suspect status"); see also, *e.g.*, *Concepcion*, 563 U.S. at 339; *Perry*, 482 U.S. at 492 n.9.

II. The Decision Below Conflicts With The FAA And This Court's Decisions Interpreting The Statute.

A. The FAA Preempts The Express-Authorization Rule Announced Below.

Respondents' defense of the merits of the decision below is cursory. They essentially ignore the principal dissenting opinion—joined by three of the lower court's seven Justices—which explained in detail why the majority had impermissibly discriminated against arbitration agreements. Respondents take at face value the majority's assertions that the decision below is neutral toward arbitration.

But this Court rejected a similarly credulous approach in *Imburgia*, where the respondents attempted to rely on the California Court of Appeal's purportedly neutral interpretation of the phrase "law of

your state" in a consumer contract. *Imburgia* held that although "California courts are the ultimate authority on [California] law," it was for this Court to "decide whether the decision of the California court places arbitration contracts "'on equal footing with all other contracts.'" *Imburgia*, 136 S. Ct. at 468 (quoting *Buckeye*, 546 U.S. at 443). In other words, the Court must determine whether a state court would in fact "interpret contracts other than arbitration contracts the same way," rather than simply accepting the state court's professions of neutrality. *Id.* at 469.

Here, it is clear that the express-authorization rule is *not* neutral, but rather is "unique" to arbitration and hence invalid. *Ibid.* The Kentucky Supreme Court did not hold, as respondents suggest, that *any* "significant transaction potentially unforeseen by the principal * * * must be set out explicitly in the power of attorney." Opp. 22. Rather, it held that even when the agent has been given the express authority *to contract*—as the attorney-in-fact in the *Clark* case below had—a further express reference to arbitration in the power of attorney is needed before the attorney-in-fact can agree to arbitration. As the dissenting Justices below observed, that rule clearly "singles out arbitration agreements for disfavored treatment" and hence is preempted. Pet. App. 78a (Abramson, J., dissenting).[4]

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[4] The only case respondents cite to support a purported general rule of Kentucky law that any "significant transaction" must be expressly mentioned in a power of attorney is *Clinton* v. *Hibbs' Executrix*, 259 S.W. 356 (Ky. 1924). See Opp. 21-22. And that case does not stand for any such rule. In *Clinton*, the court held that a wife lacked authority to sign her husband's name as a surety because her power of attorney expressly *limited* her au-

Respondents argue that at minimum, the decision below should be upheld as to the *Wellner* case because the decision there did not turn on the "fail[ure] to include an express provision regarding arbitration." Opp. 19. But the Kentucky court effectively required an express mention of arbitration when it held that the *Wellner* power of attorney—which authorized the agent to make contracts "of every nature in relation to both real and personal property" (Pet. App. 22a)—did not encompass the making of arbitration agreements. This reasoning clearly disfavors arbitration agreements in violation of the FAA: It is unthinkable that Kentucky courts would interpret the phrase "contracts * * * in relation to * * * personal property" to exclude any other kind of agreement relating to an individual's legal claims, given that Kentucky law recognizes causes of action as "personal property." See Pet. App. 85a (Abramson, J., dissenting). In short, the decision below impermissibly discriminated against arbitration in its treatment of both the *Clark* and *Wellner* powers of attorney.

Finally, respondents attempt in vain to distinguish away this Court's FAA precedents—including *Concepcion*, *Casarotto*, and *Marmet*—by arguing that they should be limited to their precise facts. Opp. 26-30. But the principles established by those cases are not so factbound. On the contrary, the spectrum of factual scenarios presented in those cases itself

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thority to "such acts as were necessary to the conducting of the business affairs *of her husband*," which did not include acting as a surety on a third party's debt. *Id.* at 357-58 (emphasis added). In short, *Clinton* provides no support whatever for the notion that the Kentucky Supreme Court would impose an express-authorization requirement on powers of attorney outside the context of arbitration.

demonstrates that the FAA broadly preempts *any* state-law rule that fails to "place arbitration agreements on an equal footing with other contracts" or that "stand[s] as an obstacle to the accomplishment of the FAA's objectives" of promoting arbitration. *Concepcion*, 563 U.S. at 339, 343. A rule requiring an explicit reference to arbitration before an agent can bind her principal to arbitration clearly falls into both prohibited categories. See Pet. 12-17; pp. 6-7, *supra*.

B. The FAA Fully Applies Here.

Unable to show that the decision below comports with the FAA, respondents remarkably insist that the FAA does not apply here at all—a position that even the majority below did not endorse. According to respondents, the FAA applies only to "dispute[s] regarding an arbitration agreement's validity," not to "dispute[s] as to whether an agreement was 'ever concluded.'" Opp. 16 (quoting *Buckeye*, 546 U.S. at 444 n.1).

Respondents are mistaken. To begin with, there is no contract-formation dispute here: each of the attorneys-in-fact here undisputedly entered into a written arbitration agreement on behalf of her principal, and the question is only whether those agreements should be enforced. That question is squarely governed by Section 2 of the FAA. See 9 U.S.C. § 2 (providing that written agreements to arbitrate disputes are "enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

In any event, parties cannot circumvent the FAA by designating discriminatory state-law rules as rules of contract formation. Indeed, this Court reject-

ed an analogous attempt by the respondents in *Imburgia*, who contended that the FAA was inapplicable because the dispute there involved the "threshold question of whether there's an arbitration agreement in the first place." Tr. of Oral Arg. at 30, *Imburgia*, 2015 WL 6552642, at *30; see also *id.* at *41, 46-47.

This Court squarely rebuffed that attempt to limit the FAA, recognizing that the question before it was whether the California court's "*interpretation* of [the] contract * * * is consistent with the [FAA]." *Imburgia*, 136 S. Ct. at 468 (emphasis added). It should do the same here.

Neither of respondents' authorities for the proposition that the FAA is categorically inapplicable to contract-formation disputes supports that approach. *Buckeye* drew a distinction between disputes over the validity of an arbitration agreement and disputes over whether a contract was formed only in order to explain that the former could be delegated to arbitrators while reserving decision on whether the latter could be delegated. It did not hold that formation disputes are beyond the reach of the FAA.

And in *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938 (1995), this Court held only that federal courts determine whether an arbitration agreement was formed based on "*ordinary* state-law principles that govern the formation of contracts." *Id.* at 944 (emphasis added). The Court did not hold, as respondents suggest, that state-court rules of contract formation—even those that single out arbitration for suspect status and reflect the judicial hostility that the FAA was enacted to prevent—are insulated from the FAA.

That suggestion fails as a matter of common sense. If respondents were correct, a state could enact a law expressly forbidding attorneys-in-fact to enter into arbitration agreements in any circumstance, or a law providing that state residents lack the capacity to enter into arbitration agreements unless they receive prior court approval, and those laws would be immune from federal scrutiny even if they blatantly disfavor arbitration. But States cannot circumvent the FAA simply by wrapping their hostility to arbitration in the mantle of "contract formation."

III. Summary Relief Is Appropriate.

As we suggested in the petition, the Court may wish to consider granting summary reversal in this case. Respondents have offered no persuasive rebuttal to our showing that the decision below impermissibly singles out arbitration agreements for disfavored treatment and is therefore preempted by the FAA and irreconcilable with this Court's precedents. There is no reason to think that respondents will have any more to say if plenary review is granted.

If the Court declines to reverse the judgment below summarily, it should in the alternative consider granting, vacating, and remanding the case in light of *Imburgia*. Respondents argue that the Kentucky Supreme Court has "already taken [*Imburgia*] into account" because petitioners cited it as supplemental authority at the rehearing stage (Opp. 30), but the Kentucky Supreme Court denied rehearing in a one-line summary order that neither analyzed *Imburgia* nor gave any indication that the court had confronted its reasoning. See Pet. App. 1a-2a.

An order by this Court granting, vacating, and remanding the decision below in light of *Imburgia*,

however, would force the Kentucky Supreme Court to confront and directly address the reasoning in *Imburgia*—and send a clear message that the Court below must comply with the FAA and this Court's precedents.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal, or vacatur for reconsideration in light of *Imburgia*.

Respectfully submitted.

ANDREW J. PINCUS
Counsel of Record
ARCHIS A. PARASHARAMI
DANIEL E. JONES
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioners

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